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Supreme Court of the United States

October Term, 1966.

No. 1331

HOLLAND AMERICA LINE
(Sued as N. V. Nederlandsch-Amerikaansche Stoomvaart Mattschappij),

Petitioner,

v.

PHILADELPHIA CEILING AND STEVEDORING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
I. This Case Involves Only the Well-Settled Issue of the Unconstitutionality of a Court Re-examining Facts So as to Substitute Its Judgment for That of a Jury, When There is a View of the Evidence Consistent With the Verdict of the Jury	5
II. Even if This Court Had to Reach the Issue of Whether or Not There Was a Disputed Fact Issue for the Jury, the Petitioner Failed to File a Motion for Directed Verdict as Required by Rule 50(b) and Did Not Except to any Relevant Portion of the Trial Judge's Charge; Therefore, the Lower Courts Were Not Bound to Examine the Legal Issues Purportedly Raised	6
III. This Court Cannot Be Expected to Grant Certiorari in Every Situation Where One Particular Court of Appeals Is Evenly Divided, Especially When There Is No Conflict Between Circuits Nor Within the Circuit Itself and the Case Involves a Narrow Resolution of a Factual Issue	8
CONCLUSION	10

TABLE OF CITATIONS.

Cases:	Page
Aetna Casualty and Surety Co. v. Yeatts, 122 F. 2d 350 (4th Cir., 1941)	7
Arnold v. Panhandle & S. F. R. Co., 353 U. S. 360	5
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S. 355	2, 5
Budge Manufacturing Co. v. U. S., 280 F. 2d 414 (3rd Cir., 1960)	6, 7
Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212	6
Dick v. New York Life Ins. Co., 359 U. S. 437	5
Dickerson v. Franklin Nat. Ins. Co., 130 F. 2d 35 (4th Cir., 1942)	7
Dziedzina v. Dolphin Tanker Corp., 361 F. 2d 120 (3rd Cir., 1966)	9
Hagens v. Farrell Lines, Inc., 237 F. 2d 477 (3rd Cir., 1956)	9
Harnik v. Lilley, 167 F. 2d 159 (8th Cir., 1948)	7
Hodgson v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32 (3rd Cir., 1961), cert. den., 369 U. S. 848	9
Home Ins. Co. of N. Y. v. Davila, 212 F. 2d 731 (1st Cir., 1954)	7
Johnson v. New York, New Haven & Hartford Railroad Co., 344 U. S. 48	7
Mooman v. Reading Co., 66 F. Supp. 636, aff'd. 156 F. 2d 678 (3rd Cir., 1946)	7
Mutual Benefit Health & Acc. Assn. v. Thomas, 123 F. 2d 353 (8th Cir., 1941)	6
Pruett v. Marshall, 283 F. 2d 436 (5th Cir., 1960)	7
Rotondo v. Isthmian SS Co., 243 F. 2d 581 (2nd Cir., 1957)	7
Southern Railway Company v. Miller, 285 F. 2d 202 (6th Cir., 1960)	7
Strickland v. Perry, 244 F. 2d 24 (5th Cir., 1957)	7
Thompson v. Trent Marine, 353 F. 2d 632 (3rd Cir., 1965)	9
U. S. ex rel., Robinson v. Johnston, 316 U. S. 649	9
Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 563	9

TABLE OF CITATIONS (Continued).

Miscellaneous:

	Page
Fed. R. Civ. P. Rule 50(a)	6
Fed. R. Civ. P. Rule 50(b)	6, 8
U. S. Constitution, Seventh Amendment	5

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OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (Pet. 1a-4a)[1] is not yet reported. The majority opinion of the Court of Appeals for the Third Circuit (Pet. 5a-8a), and the dissenting opinion (Pet. 8a-10a) are not yet reported. The order of the Court en banc of the Court of Appeals for the Third Circuit was entered on December 28, 1966. A second petition for rehearing was denied on February 16, 1967.

JURISDICTION.

The jurisdictional requisites are set forth adequately in the Petition, except for the failure to state that there is no basis in the applicable Rules of the Court of Appeals for the Third Circuit for filing a second petition for rehearing. Further, the date of the filing of the Motion for enlargement of time is not set forth.

1. "Pet." refers to the Petition for Writ of Certiorari filed on behalf of Holland America Line.

QUESTIONS PRESENTED.

Petitioner, Holland America Line (Ship), sought indemnity from the Respondent, Philadelphia Ceiling & Stevedoring Company (Stevedore), in a third-party action after a jury found for the plaintiff longshoreman against the Petitioner, Ship. The longshoreman had stepped into a bilge well hole which had no cover on it. The Ship conceded unseaworthiness. In the third-party action the Ship did not move for a directed verdict and took no exceptions to the charge of the Trial Judge. The Jury found in favor of the Stevedore. The Trial Judge, the majority of a three judge panel of the Court of Appeals for the Third Circuit and the en banc Court of the same Court of Appeals refused to substitute their judgment for that of the jury since there was a view of the evidence consistent with the jury's verdict. Therefore, the questions presented are:

1. Should this Court issue its writ of certiorari to consider the question whether the Court of Appeals should have substituted its judgment for that of the jury when there was a view of the evidence consistent with the jury's verdict, and in light of this Court's decision in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355.

2. Should this Court issue its writ of certiorari to consider the question as to whether Ship should have been granted a new trial when its original motion on appeal was limited to the contention that there were no disputed issues of fact, when it did not move for a directed verdict, and when the jury considered all the evidence following a charge to which no exception was taken?

3. Should this Court issue its writ of certiorari in every case of alleged importance merely because a Circuit Court of Appeals sitting en banc with an even number of judges divides evenly on the question, and where there is no conflict in the decisions of the particular circuit or with decisions of other circuits?

STATEMENT OF THE CASE.

Robert Jones was injured on January 5, 1961, while working as a longshoreman for the Respondent, Stevedore. These were the circumstances.

Stevedore was employed by Ship to discharge peat moss from its ship, the Sommelsdyk, while she was in Philadelphia.

The peat moss was located in one of the deep tanks in No. 3 hold. The deep tank was 21 feet long and about 30 feet wide and 18 feet deep (16b).[2] About 712 bales of peat moss were stowed in the deep tank in which Robert Jones was working. As the discharge operation progressed, loose peat moss accumulated. At some point in time, loose peat moss was "stacked" as high as a door (in the court room) in some places in the tank (3b). When the tank was empty, except for a bale or two, Jones went to get one of them and his leg disappeared into the peat moss. His other leg went from under him and he suffered a back injury (3b). His leg descended into a hole up to his knee and when his leg came out it was wet (4b). He had fallen into a bilge well from which the cover had been removed. The loose peat moss was described as looking like dried out tobacco (4b), and the deck of the tank was not visible.

The chief officer, Aalbert Mulder, saw Jones on the weather deck, observed his wet leg and went to investigate. He found the bilge well covering without difficulty. The area was covered by loose peat moss to a depth of about two or three inches. While looking for the bilge well lid, his finger tips were on the deck of the tank (21b-22b).

Jones sued Ship claiming his injuries were caused by the unseaworthiness of the Ship and the negligence of its

2. The page references are to the original record as contained in Respondent-Appellee's Appendix filed in the Third Circuit Court of Appeals, copies of which were reported filed by Petitioner.

personnel. Ship joined Stevedore, claiming indemnity in the event of its liability.

The suit was tried before Judge Luongo and a jury. At the trial, in addition to the evidence referred to above, Ship, in the prosecution of the third-party action, offered the testimony of an expert concerning the proper method of discharging peat moss. When all the evidence was in, Ship did *not* ask for a directed verdict against Philadelphia Ceiling.

Before counsel for the parties made their closing speeches to the jury, the Trial Judge held a conference of counsel in chambers. During this conference, Ship conceded that its vessel was unseaworthy (55b-57b). The jury was charged and, after he had finished, the Trial Judge asked for exceptions or additions to the charge (77b). Ship's only exception related to Jones' life expectancy (78b). No exception was taken to any part of the charge relating to the liability vis-à-vis third-party plaintiff and third-party defendant.

The jury deliberated for a number of hours, and sought additional instructions concerning the admission of unseaworthiness by Ship. Finally, the jury returned a verdict in favor of Robert Jones against Ship and in favor of Stevedore in the third-party action.

The Trial Judge denied Ship's motion for a new trial and affirmed the verdict of the jury in favor of the Stevedore. On appeal, the Court of Appeals affirmed setting out at length in their opinion the many fact issues that were properly left to the jury. Finally, the Court en banc of the Court of Appeals for the Third Circuit—eight judges sitting—affirmed the judgment of the District Court. Ship's petition for a second rehearing was denied.

The Petition to this Court followed.

ARGUMENT.

I. This Case Involves Only the Well-Settled Issue of the Unconstitutionality of a Court Re-examining Facts So as to Substitute Its Judgment for That of a Jury, When There Is a View of the Evidence Consistent With the Verdict of the Jury.

This Court has spoken definitively concerning this fundamental mandate, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., supra; Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360; *Dick v. New York Life Ins. Co.*, 359 U. S. 437.

The opinions of the District Court (Pet. 1a-4a) and the Court of Appeals (Pet. 5a-8a) set out cogently that the jury had to resolve conflicts between Ship's witnesses and Stevedore's witnesses. The jury had to resolve a number of crucial facts: Did the longshoreman remove the bilge well lid? Was the misplaced bilge well lid a condition which a cursory examination by the stevedore would have disclosed? How much loose peat moss was there? Were cargo hooks used to dislodge the bales? Was the performance of the stevedore company a substantial factor in bringing about the plaintiff's injury? Was the work of the stevedore carried out in a safe and efficient manner?

The petitioner would urge upon this Court that there was no conflict in the evidence before the jury. This argument has been rejected by three judicial bodies.

The Court of Appeals in the instant case acted properly in refusing to reverse the unanimous verdict of the jury. To have done otherwise would have been a violation of the Seventh Amendment to the Constitution of the United States and would have been improper under the rulings of this Court.

II. Even if This Court Had to Reach the Issue of Whether or Not There Was a Disputed Fact Issue for the Jury, the Petitioner Failed to File a Motion for Directed Verdict as Required by Rule 50(b) and Did Not Except to Any Relevant Portion of the Trial Judge's Charge; Therefore the Lower Courts Were Not Bound to Examine the Legal Issues Purportedly Raised.

The petitioner argues to this Court that there were no disputed issues of fact (Pet. 11, 12) and that realistically, a directed verdict was in order at the trial of this case. Yet, a motion for a directed verdict was never filed nor was there any exception taken to the charge of the Trial Judge.

It is now well settled that a Motion for Judgment notwithstanding the verdict may be entertained only if the movant has made a motion for a directed verdict at the close of all the evidence, and that a mere request for binding instructions in points for charge is not a substitute for compliance with Rule 50, *Budge Manufacturing Co. v. U. S.*, 280 F. 2d 414 (3rd Cir., 1960); *Mutual Ben. Health & Acc. Assn. v. Thomas,* 123 F. 2d 353 (8th Cir., 1941); see also *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212.

Rule 50 requires that the motion for a directed verdict be filed at the close of the evidence offered by an opponent and that such motion "shall state the specific grounds therefor" (Rule 50(a)). As heretofore noted, no such motion was filed at the close of Petitioner's evidence, nor indeed at any time during the trial.

A Motion for Judgment notwithstanding the verdict may be entertained only if the movant has duly made a motion for a directed verdict in accordance with Rule 50, *Mutual Benefit Health & Acc. Assn. v. Thomas, supra.* Hence, a party who fails to move for a directed verdict at the close of all the evidence cannot present to the trial court a question as to the legal sufficiency of the evidence to support a verdict for his opponent by a motion for

judgment notwithstanding the verdict or raise the question on appeal, *Mooman v. Reading Co.*, 66 F. Supp. 636, aff'd. 156 F. 2d 678 (3rd Cir., 1946); *Aetna Casualty and Surety Co. v. Yeatts*, 122 F. 2d 350 (4th Cir., 1941); *Dickerson v. Franklin Nat. Ins. Co.*, 130 F. 2d 35 (4th Cir., 1942).

Since it is clear that no mention for directed verdict pursuant to Rule 50 was ever filed by Petitioner, it would have been error for the Court of Appeals to consider the Petitioner's right to judgment n.o.v. on any ground or to direct the District Court to enter judgment for Petitioner.

For purposes of appeal, a motion for a directed verdict is necessary to raise the legal question of the sufficiency of the evidence or the propriety of the jury's findings, *Budge Mfg. Co. v. U. S., supra.*

When a party allows a case to go to the jury without challenging the sufficiency of the evidence by a motion for a directed verdict, the appellate court is powerless to review the sufficiency of the evidence to support the verdict, *Pruett v. Marshall*, 283 F. 2d 436, 438 (5th Cir., 1960); *Southern Railway Company v. Miller*, 285 F. 2d 202, 206 (6th Cir., 1960); *Rotondo v. Isthmian SS Co.*, 243 F. 2d 581, 582 (2nd Cir., 1957).

Where it is a party's contention that as a matter of law he was entitled to a verdict, nothing is present for consideration of the reviewing Court in the absence of a motion for directed verdict, *Strickland v. Perry*, 244 F. 2d 24 (5th Cir., 1957); *Harnik v. Lilley*, 167 F. 2d 159 (8th Cir., 1948); *Home Ins. Co. of N. Y. v. Davila*, 212 F. 2d 731 (1st Cir., 1954).

The importance of Rule 50 and compliance with its precise terms is forcefully demonstrated by the decision of this Court in *Johnson v. New York, New Haven & Hartford Railroad Co.*, 344 U. S. 48, where although the party had filed a motion for a directed verdict at the close of the evidence under Rule 50 which was denied by the Trial Judge, *but did not*, in his subsequent motions, expressly request "*to have judgment entered in accordance*

with his motion for a directed verdict'' as required by Rule 50(b), it was held that the Court of Appeals could not enter or direct the trial court to enter a judgment notwithstanding the verdict.

In the instant case the Petitioner not having filed a motion for a directed verdict as against any parties obviously could not and did not comply with the requirement of the Rules and his failure to do so is an indication that Petitioner was well aware that many factual conflicts were in the evidence. This is a further reason that this Court should not grant its extraordinary Writ.

III. This Court Cannot Be Expected to Grant Certiorari in Every Situation Where One Particular Court of Appeals Is Evenly Divided, Especially When There Is No Conflict Between Circuits Nor Within the Circuit Itself and the Case Involves a Narrow Resolution of a Factual Issue.

Petitioner's entire petition is based on the fact that certiorari should be granted because the Court of Appeals for the Third Circuit was evenly divided. This, of itself, can never be a reason for reviewing a case. Petitioner has cited no authority for such a proposition. Indeed, if this were a basis for granting certiorari, all appellate courts would have to be uneven in number or face the possibility of unending appeals.

Petitioner's cause must stand or fall on the merits of its case and respondent submits that the facts of the case were in dispute and were resolved by the jury with the result that this particular case has been decided. There is nothing unique about the specific facts of this case that would make them of such concern so as to invoke this Court's discretionary jurisdiction.

Petitioner's claim that the decisions in the Third Circuit are in conflict was fully argued before the Court of Appeals and the same arguments are repeated in the present Petition (Pet. 8, 9, 10). This claim of conflict in the deci-

sions within the Third Circuit will not bear analysis and the very cases that petitioner cites, clearly indicate that under the instructions of this Court, the present case was left to the jury and they quite properly resolved conflicts in the evidence in deciding whether or not the Stevedore performed its work properly.[3]

The *Thompson* case and the *Dolphin Tanker* case are of no aid to petitioners.[4] In both cases the factual evidence was of an entirely different kind than that offered in this case because the stevedore had knowledge of the dangerous condition and did nothing to rectify it, whereas in the present case, the shipowner conceded that the condition was not known to the stevedore.

Further, it is submitted that even if there was a conflict within the decisions of different panels within the Circuit, this alone would not merit the granting of the requested Writ, *U. S. ex. rel., Robinson v. Johnston,* 316 U. S. 649.

Finally, petitioner claims that there is a conflict between Circuits that must be resolved and that this case is the proper vehicle. This is totally without merit. The cases cited by petitioner deal with known hazardous conditions and evidence which did not raise factual issues. Such was not the present case.

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3. In *Hagens v. Farrell Lines, Inc.,* 237 F. 2d 477 (3rd Cir., 1956), the Third Circuit specifically referred to *Weyerhaeuser S. S. Co. v. Naciremá Operating Co.,* 355 U. S. 563, holding: "Whether the stevedoring company's conduct constituted a breach . . . was, of course, a question of fact for the jury." Similarly, in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional,* 294 F. 2d 32 (3rd Cir., 1961), cert. den., 369 U. S. 848, the Third Circuit repeated: "The shipowner forgets that an appellate court will not interfere with a judgment entered on a verdict returned by a jury simply because of its opinion as to the weight or preponderance of the evidence."

4. *Thompson v. Trent Marine,* 353 F. 2d 632 (3rd Cir., 1965); *Dziedzina v. Dolphin Tanker Corp.,* 361 F. 2d 120 (3rd Cir., 1966).

CONCLUSION.

For the reasons stated in the Brief in Opposition to the Petition for a Writ of Certiorari, said petition should be denied.

Respectfully submitted,

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